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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re the Marriage of ELAINE M. and LOWELL
A. JAKS.

ELAINE M. RUDIS,

Respondent,

v.

LOWELL A. JAKS,

Appellant.

F038843

(Super. Ct. No. EK 2916)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John D.
Oglesby, Judge.

Lowell A. Jaks, in pro. per., for Appellant.

Elaine M. Rudis, in pro. per., for Respondent.

This appeal arises from a child custody dispute between Lowell A. Jaks (Father) and Elaine M. Rudis (Mother). Father argues the trial court improperly awarded sole physical custody of the parties' son to Mother. According to Father, neither changed circumstances nor substantial evidence supported supplanting an earlier order that awarded joint physical custody. Father also challenges the child support allocation.

However, Father's reliance on the earlier order is misplaced. That order was temporary and thus the trial court could modify the custodial arrangement without proof of a significant change of circumstances. Further, the evidence supports the custody award and the child support allocation. Consequently, the judgment will be affirmed.

STATEMENT OF THE CASE AND FACTS

Mother filed a petition for dissolution of her marriage to Father in May 2000. The petition requested that the court grant joint legal and physical custody of their son, Alec.

However, in October 2000 Mother filed an amended petition for dissolution and an order to show cause seeking joint legal custody but sole physical custody of Alec. Mother alleged that she was concerned about Alec's welfare due to Father's exhibiting what she considered to be unusual and unhealthy behavior. According to Mother, Father had physically and emotionally abused her during their marriage. Mother further set forth examples of Father's current erratic and abusive behavior toward both her and Alec. Father denied the allegations.

The hearing on the order to show cause took place on November 1, 2000. The court heard at length from both parties before making a decision. Nevertheless, the court emphasized that the hearing was not the trial and that it was issuing temporary orders only. The court ordered shared custody and set forth the custody schedule. Additionally, Father was to complete an anger management class and a parenting class.

The matter was tried on May 3, 2001, with both parties presenting considerable testimony. At the conclusion of the trial the court stated that, in its opinion, Mother had

testified credibly “regarding the specific acts of domestic violence and intimidation, not so much physical intimidation outside the acts of violence, but emotional intimidation.” The court noted that Father had not presented rebuttal evidence on this issue. Consequently, the court found that Father had conceded the point. Therefore, in accordance with the statutory presumption, the court awarded sole physical custody to Mother. However, based on Father’s completion of the ordered classes and his relationship with his son, the court awarded joint legal custody.

The court then outlined a visitation schedule. In general, Father was to have Alec on alternate weekends and on Wednesday nights. However, the court also gave Father the option of caring for Alec during the day while Mother was working. Father could decide on a day-to-day basis whether to pick Alec up or leave him in the after-school program until Mother got off work. Father’s child support obligation was based on his having custody of Alec 39 percent of the time.

Before concluding the proceeding, the court asked Father if he had any further evidence that the court should consider. In response, Father offered a rebuttal to Mother’s abuse allegations. Father explained that he did not address this issue before because he thought that custody had been determined at the previous hearing. The court again advised Father that those earlier custody orders were temporary. Thereafter, despite the additional information, the court decided to stand by its original ruling.

DISCUSSION

1. *A change of circumstance showing was not required to award Mother sole physical custody.*

The focus of California’s statutory scheme governing child custody is the best interest of the child. (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255.) Consequently, in making the initial custody determination, the trial court has “the widest discretion” to

choose an appropriate parenting plan. (Fam. Code,¹ § 3040, subd. (b).) The trial court must look to all circumstances bearing on the best interest of the minor child including the health, safety and welfare of the child, any history of abuse by one parent against the child or the other parent, and the nature and amount of contact with the parents. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 31-32.)

Once a final judicial determination of custody has been made it cannot be modified unless the moving party demonstrates a significant change of circumstances. (*Montenegro v. Diaz, supra*, 26 Cal.4th at p. 256.) This “changed circumstance” test does not supplant the “best interest of the child” test but, rather, is an adjunct to it. (*Burchard v. Garay* (1986) 42 Cal.3d 531, 535.) After it has been established that a particular custodial arrangement is in the best interests of the child, the court need not reexamine that question. Instead, the court should preserve the custody plan unless some significant change in circumstances indicates that a different arrangement would be in the child’s best interest. (*Ibid.*)

However, the change of circumstance rule only applies where a *final* custody determination has been made. (*In re Marriage of Lewin* (1986) 186 Cal.App.3d 1482, 1487.) Although a child custody proceeding may involve stipulated or pretrial orders, those orders are often not intended to be final judgments. (*Montenegro v. Diaz, supra*, 26 Cal.4th at p. 258.) Before the changed circumstance rule is invoked, there must be a clear, affirmative indication that the order was intended to be final. (*Ibid.*)

Father contends the trial court erred when it modified the custody arrangement from joint physical custody to sole physical custody. Father points out that Mother did not show that circumstances had substantially changed between the hearing on the order to show cause and the trial.

¹ All further statutory references are to the Family Code.

However, a changed circumstance showing was not required. It is clear that the orders made after the hearing on Mother's order to show cause were intended to be temporary. The trial court consistently referred to the orders as such, both orally and in writing. Moreover, at trial, the court reminded Father that the prior custody orders were temporary. Thus, there had been no prior final judicial determination of custody. Accordingly, following trial the court had wide discretion to establish a custody arrangement that it determined was in Alec's best interest. Since the prior judicial custody determination was for the purpose of establishing custody temporarily, not permanently, res judicata concepts are inapplicable. (*In re Marriage of Lewin, supra*, 186 Cal.App.3d at p. 1488.)

2. *The trial court's order is supported by substantial evidence.*

In awarding Mother sole physical custody, the trial court relied on section 3044. Under that section there is a rebuttable presumption that an award of joint physical custody to a parent who has been found by the court to have perpetrated domestic violence within the previous five years is detrimental to the best interest of the child. "Perpetrated domestic violence" includes being found to have intentionally or recklessly caused or attempted to cause bodily injury or "to have engaged in any behavior involving, but not limited to, threatening, striking, harassing, destroying personal property or disturbing the peace of another" (§ 3044, subd. (d).)

Father contends the record does not support the trial court's finding that he had perpetrated specific acts of domestic violence and had engaged in emotional intimidation during the marriage. According to Father, the statute is intended to protect against "serious" domestic violence. However, Mother never even used the term "domestic violence" during her testimony. Father further argues that the order itself is inconsistent with this finding. In other words, due to the flexible and extensive visitation schedule the arrangement is actually joint physical custody with shared parenting.

Contrary to Father's position, the record supports the trial court's finding. Mother testified that Father had hit her several times, one time damaging her jaw. Further, Mother provided specific examples of Father's emotional intimidation and manipulation.

On review of custody and visitation orders, the appellate court must apply the deferential abuse of discretion test. (*Montenegro v. Diaz, supra*, 26 Cal.4th at p. 255.) "The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the 'best interest' of the child." (*In re Marriage of Burgess, supra*, 13 Cal.4th at p. 32.)

In applying this test, it must be remembered that it was the trial judge who heard the evidence and observed the demeanor, attitude and candor or lack of candor of the witnesses. Thus, the trial judge is best qualified to pass upon and determine the factual issues. Consequently, only upon a clear and convincing showing of abuse of discretion will the trial court's order in such matters be disturbed on appeal. (*In re Marriage of Lewin, supra*, 186 Cal.App.3d at p. 1492.)

Here, the trial court found Mother's testimony to be "very credible." This testimony supported the finding that Father "perpetrated domestic violence." Further, the order permitting Father extensive visitation is not inconsistent with the award of sole physical custody. Although "sole physical custody" means that a child shall reside with and be under the supervision of one parent, the court still has the power to order visitation. (§ 3007.) The trial court did not abuse its discretion.

3. *The trial court did not err in apportioning child support.*

For purposes of calculating child support, the court used 39 percent as the approximate percentage of time that Father will have primary physical responsibility for Alec. In contrast, the temporary custody order used 43 percent. Father argues the trial court erred in that under the permanent order the time he is responsible for Alec has increased.

However, the actual visitation specified in the permanent order amounts to less time with Alec than the temporary order. The possible increase in time is at Father's option. He may, but is not required to, act as the day care provider for Alec during the week. Thus, with the exception of Father's Wednesday night visitation, Mother still has primary physical responsibility for Alec during the week after school. The time of a parent's primary physical responsibility includes the time the child is in day care. (*In re Marriage of Katzberg* (2001) 88 Cal.App.4th 974, 981.) Whether the care is provided by Father or by a third party does not affect the analysis. Father controls when, if ever, he will provide this additional care. Under these circumstances, the trial court's calculation was not in error.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.

Levy, J.

WE CONCUR:

Vartabedian, Acting P.J.

Cornell, J.